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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 668

ALBERTA WEBER DEJONG,

Petitioner,

vs.

RUTH TIETSORT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alberta Weber DeJong, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on the 25th day of November 1942, in Case No. 7946, *Federal Life Insurance Company, an Illinois Corporation, plaintiff*, v. *Ruth Tietsort and Alberta Weber DeJong, interpleaded defendants;* on the appeal of *Alberta Weber DeJong* v. *Ruth Tietsort;* affirming a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, awarding the insurance fund in question to Ruth Tietsort.

Summary and Short Statement of the Matter Involved.

Federal Life Insurance Company, an Illinois Corporation, filed a bill of interpleader in the U. S. District Court for the Northern District of Illinois, Eastern Division, against Ruth Tietsort, a citizen of the State of Michigan and Alberta Weber DeJong, a citizen of the State of Illinois, invoking jurisdiction under Subdivision 26 of Sec. 41 of Title 28 of the U. S. Code (Rec. 1).

A decree was entered in interpleader, by which the insurance company was allowed, out of the fund of $3,000.00, payable under the policy, $150.00 reasonable attorneys' fees and $15.84 costs, and the balance of $2,834.16 was ordered to be deposited in the Registry of the Court. This was done, and the case proceeded upon the claims of Ruth Tietsort and Alberta Weber DeJong to the fund (Rec. 3).

It was agreed, and so found, that on March 1, 1924, Ruth Tietsort was married to Carroll S. DeJong and on March 2, 1926, while the marriage relation existed, the Insurance Company issued its accident policy in question, insuring Carroll S. DeJong. The beneficiary in the policy was described as: "Mrs. C. S. DeJong, hereinafter called the beneficiary, relationship wife" (Rec. 5). The policy provided for the payment of $2,000.00 to the beneficiary (increased by 10% each year until a total sum of $3,000.00 was reached) upon the death of the insured while riding in, or driving an automobile (Rec. 6, 7).

Carroll S. DeJong divorced his wife Ruth for desertion, on September 21, 1940, whereupon in October, 1940, she married one Tietsort, and was so married at the time of the death of DeJong. The insured, on November 2, 1940, married Alberta Weber, and she was his wife at the time of his death, November 30, 1940 (Rec. 5, 6).

The policy was produced by Alberta Weber DeJong (Rec. 5). Claim and proof of loss were made by both women, each of whom contended that she was the "Mrs. C. S. DeJong, wife" of the insured to whom the fund was payable,—Ruth Tietsort by reason of the fact that she was the wife at the time of the issuance of the policy, and Alberta Weber DeJong because she was the wife at the time of the death of the insured, and became his widow (Rec. 6).

The Policy provided that the consent of the beneficiary should not be required to a change of beneficiary or to any other changes in the Policy. Also, that "No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed thereon" (Rec. 7).

Petitioner contended below, that by reason of the provision as to change of beneficiary without the consent of the beneficiary there was no vested interest in the Mrs. C. S. DeJong who was the wife of the insured at the time of the issuance of the policy; and that, the designation being a class designation of any wife of the insured, the person who answered to the designation of "Mrs. C. S. DeJong" and bore the relationship of wife to the insured at the time of his death, became entitled to the fund. This person was petitioner Alberta Weber DeJong, the second wife.

The District Court found that Ruth Tietsort, at the time of the issuance of the policy was designated the beneficiary and identified as "Mrs. C. S. DeJong, wife." That the divorce did not affect her right as beneficiary; and that the provisions of the policy relating to change of beneficiary not having been complied with, no change of beneficiary was effected; and that Ruth Tietsort was, therefore, entitled to the proceeds of the policy (Rec. 7, 8).

The District Court refused to hold the propositions of law presented by petitioner: that petitioner, at the time

of the death of the insured, answered the description of "Mrs. C. S. DeJong," and bore the relationship of wife to him: that Ruth Tietsort had been divorced by the insured and no award of any interest in the policy had been made to her: that she had thereafter married, and at the time of the death of the insured, she was not "Mrs. C. S. DeJong," who bore the relationship of wife to the insured; that only the Insurance Company could take advantage of a failure, if any, to make an endorsement of change of beneficiary on the policy, which it waived by interpleading; and that, in any event, no change was required to be endorsed, thereon, because Alberta Weber DeJong, the second wife, answered the description "Mrs. C. S. DeJong" and bore the relationship of wife to the insured at the time the policy became payable. In the alternative, the fund was payable to petitioner as Administratrix of the Estate of the insured, the first wife having ceased to be such wife at the time of the death of the insured (Rec. 9).

The Circuit Court of Appeals affirmed the decree, holding that under the law of Illinois, which it found to be applicable, because the policy was executed and issued in Illinois (Rec. 22), the designation "Mrs. C. S. DeJong, relationship wife" was not a class designation of the wife of the insured, but a specific designation by the insured of his then wife Ruth, who at the time of the death of the insured was Ruth Tietsort (Rec. 22); that the divorce for her wrong, from the insured, did not affect her rights; and, that if "the insured desired to change the beneficiary, he had to comply with the terms of the policy, and since no other selection of a beneficiary was made in the manner prescribed by the policy before the insured died, the beneficiary whose selection was valid has a vested interest in the fund" (Rec. 23). These holdings are contrary to the established law in Illinois and against the weight of Illinois authority.

Jurisdictional Basis.

1. The judgment of the Circuit Court of Appeals was entered on November 25, 1942 (Rec. 21); rehearing denied December 22, 1942.

2. Federal Life Insurance Company is an Illinois Corporation (Rec. 10). Petitioner at the time of the filing of the bill of interpleader was a citizen of Illinois, and respondent a citizen of Michigan (Rec. 1, 21). The policy in question was executed and delivered in Illinois (Rec. 22).

3. The Statute under which jurisdiction was invoked in the District Court, is Subdiv. 26 of Sec. 41, Title 28, U. S. Code (1940 Ed.); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. Jurisdiction here is invoked under Sec. 347, Title 28, U. S. Code (1940 Ed.); *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290.

Questions Presented.

1. Did the Circuit Court of Appeals, having found the law of Illinois to be applicable, follow it in this case.

2. Was the designation of beneficiary in the policy in question by the description "Mrs. C. S. DeJong, relationship wife" a class designation of any wife of the insured, or a specific designation of his then wife, Ruth, whom he afterwards divorced and who married one, Tietsort, before the death of the insured.

3. Was it the intent of the insured, as expressed in the policy, that the insurance money should be paid to his widow.

4. Is an insurance policy under the law of Illinois testamentary in character, speaking as of the time of the death of the insured, so that the person who answered to the description in this case of "Mrs. C. S. DeJong" and bore

the relationship of wife to the insured at the time of his death would take the fund.

5. Did the provision as to endorsement and approval of changes in the policy, refer to changes of beneficiary or only to other changes in the policy; and was not such a provision for the benefit of the insurance company, only, and waived by it in filing the interpleader. In any event, was any endorsement necessary in this case, or any request for change of beneficiary, in view of the class language of the beneficiary clause.

Reasons Relied On for the Granting of the Writ of Certiorari.

1. The decision of the Circuit Court of Appeals upon an important question of local Illinois law in the construction of an Illinois accident insurance policy, is in conflict with the decisions of the Supreme and Appellate courts of Illinois, and against the weight of Illinois authority.

2. The Circuit Court of Appeals, although it correctly held that the decision of the questions involved in this case was controlled by Illinois law, decided the case contrary thereto.

3. The Circuit Court of Appeals, in holding that the designation of beneficiary in the policy in this case as "Mrs. C. S. DeJong, relationship wife" was a specific designation of the then wife, Ruth, and not a class designation of any wife of the insured, ran counter to the decisions of the Supreme and Appellate courts of Illinois, and disturbed the settled law in Illinois upon the construction of insurance policies with class designation clauses; and has opened the door to litigation in all such cases in the future.

4. The Circuit Court of Appeals in holding that in order to permit the second wife of the insured, who became his widow, to take the fund, a change of beneficiary was re-

quired to be endorsed on the policy, even though the class designation of "Mrs. C. S. DeJong relationship wife" correctly described the second wife, held contrary to the law in Illinois, and in violation of the clearly expressed intent of the insured that his widow should be his beneficiary.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

JOHN JAMES ZISKA,
Attorney for Petitioner,
Alberta Weber DeJong.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

For the opinion below, see Record 21.

Jurisdiction.

The jurisdictional basis is set out in the Petition, to which reference is made.

Statement of the Case.

The facts are stated in the Petition, to which reference is made.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the designation of the beneficiary in the insurance policy in question by the description "Mrs. C. S. DeJong, relationship wife" was not a class designation of any wife of the insured, but was a specific designation of his then wife Ruth, who at the time of his death was the wife of another.

2. In holding that the intent of the insured was to benefit the person whom he had divorced prior to his death, rather than his widow; even though the designation "Mrs. C. S. DeJong, relationship wife" accurately described Alberta Weber DeJong his second wife, who became his widow.

3. In refusing to hold, in accordance with the law of Illinois, that a policy of insurance is testamentary in character and speaks as of the time of the death of the insured: and that, therefore, the person who at such time answered the description of "Mrs. C. S. DeJong" and was the widow of the insured should take the fund.

4. In holding that the endorsement of a change of beneficiary was necessary after the marriage of the insured to Alberta Weber in order that the second wife might take the fund, although such second wife was aptly described in the policy by the existing designation of beneficiary as "Mrs. C. S. DeJong, relationship wife."

5. In affirming the judgment of the District Court awarding the fund to the divorced wife of the insured who had married another, rather than to his widow, contrary to the intent of the insured as expressed in the policy.

6. In failing to follow the Illinois law applicable to the questions presented in this case.

Summary of Argument.

In Illinois a policy of insurance is testamentary in character and its construction is similar to that of Wills. The intent of the insured is ascertained from the language of the beneficiary clause of the policy in the light of the conditions surrounding the insured, both at the time the policy was issued and at the time of his death, where a change in such conditions has occurred, but no change has been made in the language of the beneficiary clause.

The Circuit Court of Appeals, having found that the law of Illinois was applicable to the policy, did not follow the cases of *Modern Woodmen of America* v. *Allin,* 301 Ill. 119 and *Pike County Mutual Benefit Assn.* v. *Berry,* 214 Ill. App. 316, which are controlling. These cases hold, in circumstances somewhat similar to those at bar, that the second wife, who becomes the widow, takes the fund, to the exclusion of the wife who was such at the time the policy issued, if the designation of the beneficiary is the class designation of "wife," and such designation remains unchanged after the death or divorce of the wife who was such when the insurance was issued.

In the policy in question, the beneficiary clause designated "Mrs. C. S. DeJong, relationship wife" as the beneficiary. This was a class designation of the wife of the insured, and not a specific designation of the person Ruth, who was then his wife. Each wife of the insured bore the conventional appellation of "Mrs. C. S. DeJong," the initials of the insured being "C. S." Alberta Weber DeJong, the second wife of the insured, who became his widow, was "Mrs. C. S. DeJong" and bore the relationship of wife to the insured at the time of his death. The fund then was payable to her, rather than to Ruth, the first wife, whom the insured had divorced and who married one Tietsort before the death of the insured. Ruth Tietsort

was neither the wife of the insured or even "Mrs. C. S. DeJong" at the time of the death of the insured. She was clearly not within the language of the policy at the time it became payable. Alberta Weber DeJong was within such designation at that time. The award of the fund to the divorced wife, Ruth Tietsort, does violence to the clearly expressed intent of the insured in the policy, and to the strong inference to be drawn from the fact that the insured made no change in the beneficiary clause after his marriage to Alberta Weber. No change was necessary, if the insured intended his widow to take the fund. This had been his intent when he procured the policy and it clearly remained his intent (he taking no action to change the policy) after his divorce of Ruth and his marriage to Alberta.

II.

It has been held that the language of the policy as to endorsement of change refers to other changes than that of beneficiary (*Townsend* v. *Fidelity Co.*, 163 Ia. 713, 723). It is now the law in Illinois (*Novotny* v. *Acacia Mutual Life Ins. Co.*, 287 Ill. App. 361; *Sun Life* v. *Williams*, 284 Ill. App. 222) that if an attempt has been made to change the beneficiary but not completed before the death of the insured, the Insurance Company only can object. Such fact of incompletion does not—contrary to the *Freund* case, —permit the interest of the former beneficiary to "vest," and thereby defeat the expressed intent of the insured. But this question, although discussed by the Court of Appeals, does not arise in this case, because there was no need of a change in the language of the beneficiary clause in question when the insured married his second wife, after the divorce of the first, in order to permit the second wife, who answered to the description contained in the beneficiary clause of "Mrs. C. S. DeJong, wife," to take the fund.

III.

The divorce of the insured of Ruth, his first wife, took her out of the class of "Mrs. C. S. DeJong, relationship wife" and the fund then became payable to the insured's Estate, no change having been made in the policy. Upon his subsequent marriage to Alberta Weber, she became "Mrs. C. S. DeJong" and bore the relationship of wife, and so came within the language of the beneficiary clause and was such at the time of his death. She, becoming the widow of the insured, the policy was payable to her.

Conclusion.

The decision of the Circuit Court of Appeals has disturbed the settled law in Illinois, expressed in the *Allin* and *Berry* cases. Insurance Companies will now be required to go beyond the identity of the person within the class designation in their policies, and will have to determine by other evidence whether such apparent class designation is not, in fact, the designation of some specific person not named in the policy, and not answering to the class designation at the time the policy becomes payable.

PROPOSITIONS OF LAW.

I.

In Illinois a policy of insurance is testamentary in character and speaks as of the time of the death of the insured, when the policy becomes payable. The intent of the insured at the time of the issuance of the policy in question was to provide for his widow. This intent must be carried out with reference to the conditions existing at the time of his death, and the person who at that time was his wife and becomes his widow, takes the fund. The Court of Appeals did not follow this law.

A. The designation by the insured, Carroll S. DeJong, of his beneficiary as "Mrs. C. S. DeJong, relationship wife," was a class designation of any wife of the insured.

B. No change of beneficiary was required to be made or endorsed on the policy after the divorce of the first wife and marriage to the second wife. The words "Mrs. C. S. DeJong, relationship wife" correctly described the second wife of the insured, who being his wife at the time of his death, was entitled to the proceeds of the policy, as the widow of the insured.

Modern Woodmen of America v. *Allin*, 301 Ill. 119.
Pike Co. Mutual Benefit Assn. v. *Berry*, 214 Ill. App. 316.
2 Joyce on Ins. (2nd Ed.) Sec. 830 p. 1821.
In Re Brown's Policy, 19 Times L. R. 98.
Mutual Life Ins. Co. v. *Devine*, 180 Ill. App. 422, 429.

II.

The requirement of an endorsement of change in the policy did not refer to a change of beneficiary. Moreover, such an endorsement, even if necessary in this case, was for the benefit of the Insurance Company, and was waived by the Company when it filed the bill of interpleader.

Townsend v. *Fidelity Co.*, 163 Ia. 713, 723.
Sun Life v. *Williams*, 284 Ill. App. 222.
Novotny v. *Acacia Mutual Life Ins. Co.*, 287 Ill. App. 361.

III.

The divorce of Ruth, the first wife, took her out of the class of "Mrs. C. S. DeJong, relationship wife" of the insured.

Pike Co. Mutual Benefit Assn. v. *Berry*, 214 Ill. App. 316.
Modern Woodmen of America v. *Allin*, 301 Ill. 119.

IV.

The divorce of Ruth, the first wife, left no one in the class of "wife" to take the fund. The fund would then be payable to the Estate of the Insured. Upon his second marriage, the fund became payable to his second wife, Alberta Weber.

Illinois Bankers' Life v. *Collins*, 341 Ill. 548, 550.
Novotny v. *Acacia Mut. Life Ins. Co.*, 287 Ill. App. 361.
Sun Life Assurance Co. v. *Williams*, 284 Ill. App. 222.
Davis v. *Metropolitan Life*, 285 Ill. App. 398, 400.
Pike Co. Mutual Benefit Assn. v. *Berry*, 214 Ill. App. 316.
Modern Woodmen of America v. *Allin*, 301 Ill. 119.

ARGUMENT.

I.

The insured intended to provide for his widow. Under Illinois law the policy should have been so construed.

The policy should have presented no difficulty to the Court below in ascertaining the beneficiary intended by the insured when he designated her as "Mrs. C. S. DeJong, wife." Under Illinois Law, he is presumed to have had in mind at that time the probable conditions existing at the time of his death. His intent to provide for his widow, in case of his accidental death while riding in, or driving an automobile, is clear from the language he used to express it. When the Court of Appeals refused to "attribute to (the insured) an intention of a subsequent marriage to another woman" and so awarded the insurance money to his divorced wife, rather than to his widow, it erroneously held that such an attribution was necessary, in order to award the fund to his widow. This is not the case. That the insured at the time he took out the policy had in mind his then wife, Ruth, is beside the point, in view of the language, "Mrs. C. S. DeJong, wife," which he used to designate his beneficiary, and the fact that he permitted this language to remain unchanged after his divorce of Ruth and his marriage to Alberta Weber.

If the Court of Appeals refuses to attribute to the insured the intention to marry another woman at the time he took out the insurance, and made it payable to "Mrs. C. S. DeJong, wife," it should also refuse to attribute to him the intention at that time, that the insurance money should be payable to a woman whom he should afterwards

divorce, and who would marry another before his death. But such considerations have no part in ascertaining the intent of the insured. He would not be expected to look into the future any further than to foresee his possible death in an auto accident, and the fact that by this calamity he might leave a widow in need of financial aid.

That the wife Ruth would be on his mind at such a time has no relevancy to the decision in this case, in view of the fact that she did not remain his wife until his death. She was not specifically named in the Policy as Ruth DeJong. Had she been, there might have been some difficulty in ascertaining the intent of the insured, had no change been made in the policy. But had she been named as Ruth DeJong in the policy, this, upon the second marriage of the insured would have been a warning to him, when he inspected the policy, to make a change to Alberta, if he wished no question raised about the right of his widow to take the fund. There would be no such need apparent to him, however, in the present case, because the designation of "Mrs. C. S. DeJong, wife" applied to Alberta, his second wife, as accurately as it had applied to Ruth when she was his wife. His initials were "C. S." and describing his wife in the policy as "Mrs. C. S. DeJong" added nothing to the word "wife" by way of specific designation of a particular person. It certainly did not specifically designate Ruth, anymore than it specifically designated Alberta. The identity of the beneficiary is to be sought in the person who was the wife of insured at the time of his accidental death when the insurance money became payable. That person was his widow, Alberta Weber DeJong, also known as "Mrs. C. S. DeJong."

The form of the designation "Mrs. C. S. DeJong, wife" undoubtedly pointed to Ruth, his wife at the time of the issuance of the policy, and as long as she remained his wife. When the Court of Appeals says that "we cannot believe

that the insured meant anyone other than his wife Ruth, when he named the beneficiary as 'Mrs. C. S. DeJong,'" there will be none to disagree. Nor can any dispute arise out of the Court's statement that "at the time of the application, Mrs. C. S. DeJong and Mrs. Ruth DeJong were one and the same person to him." The error of the Court of Appeals arises from the fact that it stops there, and fixes the intent immutably at that point upon the person of Ruth and not upon the designation "wife." It disregards the form of the designation—"Mrs. C. S. DeJong, wife" and ignores the things appearing of record which happened to the insured and to Ruth after the policy was issued.

The form of the designation "Mrs. C. S. DeJong, wife" only became significant when the insured divorced Ruth, and Ruth married another, and the insured married Alberta. Because, by this form, the insured was freed of the necessity of making any change in the designation of beneficiary in the policy. The policy which spoke at the time of the death of the insured certainly described Alberta Weber DeJong as the beneficiary, even if it had just as certainly described Ruth at the time of the issuance of the policy. There is no difficulty and no inconsistency in this. Each was the wife of the insured at some time, and each during that time bore the conventional title of "Mrs. C. S. DeJong." But the immutable intent of the insured as expressed by the unchanged policy was to benefit his widow, whoever she might be. This intent is not only expressed in the policy, but it clearly appears from the fact that after the divorce and the new marriage, the insured made no change in the beneficiary clause. There was no change that needed to be made. The terms of the policy clearly provided for his second wife, who became his widow. To hold otherwise is to do violence to the language of the policy and to the clearly expressed intent of the insured; and is to run counter to the common experi-

ence of life. For it must certainly be considered that the insured, after his second marriage, intended to provide for his new wife rather than the one he had divorced for desertion, and who had married another.

The Court below is clearly in error when it holds that in this case the word "wife" is "merely descriptive of the particular person named." Ruth was not named. The appellation "Mrs. C. S. DeJong" was the conventional one for any wife of the insured, and applied equally to his wife at the time of his death as it had applied to Ruth before her divorce and remarriage. The important words in the designation are "relationship wife." The words "Mrs. C. S. DeJong" added nothing to them, and did not make the designation other than a class designation of the wife of the insured.

In *Modern Woodmen of America* v. *Clara S. Allin et al.*, 301 Ill. 119: a benefit certificate had been issued to Richard A. Allin, payable to his wife and children. At the time the certificate was issued, Allin was married to Arabella M. Allin. Twenty years afterwards, she died, and he married again. His second wife was Clara S. Allin, who survived him. No change in the certificate had been made. The Court say, on page 121:

> "The first and principal question involved is whether the word 'wife' as employed in the Benefit Certificate means only the person who sustained that relation to the member when the certificate was issued, or whether it means the person who sustained that relation at the time of his death."

The Court treat the case as one of first impression and say:

> "We know of no valid objection to a member designating beneficiaries by classes, such as children, or wife and children, as was done in this case. If in-

stead of designation by classes, they had been designated by their individual names, they would take by that description, if living, at the death of the member.

Here one of the classes designated was the member's wife. The person answering that description at the time the certificate was issued, died before the death of the member, and at his death another woman answered that description. * * * He knew no payment could be made until death, and then only to persons answering the description of the beneficiaries. * * * At the time of his death, appellee (widow) answered the description of one of his beneficiaries. We think the language of the certificate must be construed to mean that when he died he wanted his wife to share in the benefits, without regard to whether she was the same person who was his wife when the certificate issued. The construction that the designation of wife meant Arabella M. Allin as much as if she had been specifically named as a beneficiary is in our opinion unwarranted. It was the person who at his death answered the description of the class designated that he desired to protect. * * * The person answering that description (wife) at the death of the member, when the certificate speaks for the first time, is within its protection."

In *Pike County Mutual Life Assn. et al.* v. *Cloa Berry*, 214 Ill. App. 316, a certificate had been issued to George C. Berry designating his wife and children as beneficiaries, although at the time he was unmarried. Subsequently he married Adelle Retalic and there were two children born. Adelle divorced George C. Berry and he thereafter married Cloa and died, leaving Adelle, his divorced wife, and Cloa Berry, his widow, and his two children. On page 319, the Court say:

"The benefit certificate is not payable to Adelle Berry but to the wife and children of the insured.

When the divorce was granted, she ceased to be George C. Berry's wife and she no longer bore the relation to him that is specified in the certificate and no longer had an interest in it. * * *

"In the benefit certificate under consideration, the beneficiaries are not named but described. At the time of its issuance they did not exist. The intended beneficiaries are described as those who at the time of the death of the insured sustain the relation to him of wife and children. If none such were living then to his legal heirs. Who are the beneficiaries are determined at the death of the insured. The insured died leaving Cloa Berry, his wife (his second wife) Thomas R. Berry and Marjorie M. Berry, his children, who are described in the benefit certificate as beneficiaries, and are therefore entitled to the fund the same as if they had been specifically named therein." (p. 320)

In the case of *In re Browne's Policy*, 19 Times L. R. 99, an ordinary life insurance policy was issued payable to the "wife and children" of the insured. The wife living at the time of the issuance of the policy died, and the insured remarried. On the question whether the second wife took any interest under the policy the Court say:

"One is met by the presumption, which is rather of common parlance and common sense than of law, though it has been recognized by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death. * * * But in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision. * * * I hold that by his wife * * * the settlor intended his surviving wife (if any)."

Upon the further contention that under the Married Women's Property Act such a policy "shall create a trust in favor of the objects therein named," it being urged that a trust was thereby created in the first wife, the Court said, "No one is in the strict sense 'named' in this policy, and the word is not happily used. There is no reason why the trust should not include objects yet unascertained."

In the case at bar, the designation was of the wife of the insured. No particular person was named by the words "Mrs. C. S. DeJong" for each wife of the insured was "Mrs. C. S. DeJong." The person intended to be benefited, therefore, was the widow of the insured.

In 2 Joyce on Insurance (2nd ed.), Sec. 830, p. 1822, the writer discusses the holding in *Day* v. *Case*, 43 Hun. (N. Y.) 179, where a benefit certificate procured by H. M. Case, husband, was made payable to "Mrs. H. M. Case or lawful heirs," and the Court held that the fund should go to the daughter of the first Mrs. Case as her heir, rather than to the second Mrs. Case who was the wife of the insured at the time of his death.

> Joyce says: "We cannot, however, pass over this decision without comment. The object of these societies is to primarily provide for the widow of the member, and the contract should be construed with this fact in mind. In this instance the widow was Mrs. H. M. Case, so designated, who survived the insured, differing from the designation in a Wisconsin case where the beneficiary was named Ida B. Peck, who was the wife. But the court declares that it cannot construe it as meaning 'one person at one time and another at another' ignoring the fact that 'Mrs. H. M. Case' must have always been the one person who was the lawful wife. Suppose if, after his second marriage, the insured had written exactly the same provision in the policy, in

such a case would not the widow without doubt hav
been entitled to the fund? And it is noteworthy tha
it does not appear that there was any requiremen
whatever as to the manner or mode of changing th
designation, from which it may fairly be presumed tha
assured was justified in letting the designation 'Mrs
H. M. Case' stand as it was.

"Again, the courts hold that contracts of this kin
are very similar to a will, and should be construed a
much in accordance with the rules governing wills a
possible. Now, the question arises, Did not the mem
ber, by leaving the designation as it was, and by no
changing the beneficiary mean that his second wif
should be entitled to the fund? A will speaks fro
the death of the testator. There certainly was
'Mrs. H. M. Case' at that time, and it would seem tha
in accordance with this rule, there being a person t
whom this description was then applicable she woul
be entitled to the fund.

"We cannot but believe that in this case, as in a
others of a similar nature, the primary object of th
member is to provide for his widow. We do no
consider the fact that the insured could not reasonabl
have contemplated his second marriage at the time
the issuance of the certificate to be of weight. Th
fact that the insured did subsequently marry, an
then permit his former designation to stand payable t
'Mrs. H. M. Case' seems to clearly evidence an inte
that she should take the fund. In construing the
words the primary object of the society, the wordin
of the certificate and the intent of the member a
seem to reasonably point to Mrs. H. M. Case, th
widow, as the beneficiary."

II.

The requirement of an endorsement of policy change did not refer to a change of beneficiary. Such endorsement, in any event, is for the benefit of the Insurance Company and may be waived by it. But, no change was necessary in the policy in this case.

The Court of Appeals erroneously held that if "the insured desired to change the beneficiary, he had to comply with the terms of the policy, and since no other selection of a beneficiary was made in the manner provided by the policy before the insured died, the beneficiary whose selection was valid had a vested interest in the fund." This ignores the form of the designation of the beneficiary in this case. No change in the policy was needed in order to designate the second wife of the insured. She answered perfectly to the description then in the policy of "Mrs. C. S. DeJong, wife." The Insurance Company certainly would not be concerned with the question whether the first wife was named Ruth and the second Alberta, for the only question with which it was really concerned was whether at the time of the death of the insured, when the policy became payable, there was a person answering to the description of "Mrs. C. S. DeJong" who was the wife of the insured. To such a person the proceeds were payable, and to no other, even if at one time a different person had answered to that description. To hold otherwise, as the Court below has done, is to make uncertain what before was certain, and to put the burden upon the insurance companies of inquiring in all cases of class designation, such as the instant case whether or not the person answering to the designation at the time of the death of the insured is the same person who answered to it when the policy was issued. This overrules the *Allin* case (301 Ill. 119) and the *Berry* case (214 Ill. App. 316) which had laid

down the rule to be followed in class designation cases; and opens the door to much litigation.

These Illinois cases are directly in point and should have controlled the decision of the Court of Appeals in this case. It was irrelevant to discuss, as the Court below did, the alleged requirements for change of beneficiary, and the doctrine of the *Freund* case, that where an ineffective attempt has been made to change the beneficiary before the death of the insured, the insurance company cannot affect the alleged right of the first beneficiary to the fund, which, it was said in the *Freund* case, "vests" at that time. Yet, as the Court of Appeals indicates by its citation of the case of *Sun Life* v. *Williams,* 284 Ill. App. 222 (in which case the Supreme Court of Illinois denied certiorari) the *Freund* case is not now being followed in Illinois. This also appears from the decision in the later case of *Novotny* v. *Acacia Mutual Life Ins. Co.,* 287 Ill. App. 361, which holds that the provision as to endorsement of change is for the benefit of the Insurance Company only, and may be waived by it, so that the failure to complete an attempt to make a change of beneficiary, desired and expressed by the insured, cannot be defeated by the first named beneficiary on the highly artificial theory of a "vesting" of his interest at the death of the insured.

In *Townsend* v. *Fidelity Co.,* 163 Ia. 713, 723, it was held that a provision as to endorsement similar to the one at bar, did not refer to a change of beneficiary, but to other changes in the policy.

All of which is beside the point in this case, for no notice of change of beneficiary was required to be made here, after the divorce and second marriage, in order to permit the widow to take the fund, the widow being the one intended from the time of the issuance of the policy, and such intention being clearly expressed in the policy.

III.

The divorce of Ruth, the first wife, took her out of the class of "Mrs. C. S. DeJong, wife" of the insured.

When the first wife, Ruth, who answered to the description of the beneficiary in the policy as wife of the insured was divorced by Carroll S. DeJong, she was no longer in the class of "Mrs. C. S. DeJong, wife." As she did not answer to that description at the time of the death of the insured, when the fund became payable, she was not entitled to the proceeds of the policy. (*Pike Co. Mut. Benefit Assn.* v. *Berry,* 214 Ill. App. 316; *Modern Woodmen of America* v. *Allin,* 301 Ill. 119.)

It is not contended by petitioner that the divorce decree did anything more than take Ruth out of the class designation of "wife." But it did that. Had the policy been payable to Ruth by name, a different question might be presented, as was the case in *Begley* v. *Miller* cited by the Court of Appeals. When Ruth was divorced, without any provision made for her in the decree to take the proceeds of this policy, and she ceased to be the wife of the insured, she, being outside the designation in the beneficiary clause, had no further interest in the policy. By her marriage to Tietsort, before the death of the insured, she ceased to be entitled even to the conventional appellation of "Mrs. C. S. DeJong." So that at the time of the death of the insured she was neither his wife, nor was she "Mrs. C. S. DeJong."

IV.

The divorce of Ruth, the first wife, left no one in the class of "wife" to take the fund. The fund would then be payable to the estate of the insured. Upon his second marriage, it became payable to his second wife.

Had Carroll S. DeJong not married after his divorce from Ruth, there would have been no one in the class of

"wife" to take the fund. It would then have been payable to his Estate.

In *Novotny* v. *Acacia Mutual Life Ins. Co.*, 287 Ill. App. 361 (1936) the Appellate Court of Illinois, in a case where a designation of beneficiary had been cancelled and no new beneficiary named by the insured, held that the fund was payable to the administratrix, following certain cited Massachusetts cases. The Court say (p. 364):

> "Where no beneficiary is named in the policy the fund belongs to the insured's estate and the Executor or Administrator can collect."

The Court also followed *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 222 (cited by the Court below in the case at bar) saying (p. 364):

> "In *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 222, leave to appeal denied by the Supreme Court, we held that the provision for an endorsement of change of beneficiary on a policy was for the protection of the Insurance Company, which may be waived by it, and that bringing the fund into court by interpleader, waives the necessity of such endorsement."

Upon the subsequent marriage of the insured to Alberta Weber a person was provided who answered the description of the beneficiary in the policy as "Mrs. C. S. DeJong, relationship wife": and the fund became payable to her, when at the death of the insured she became his widow.

CONCLUSION.

The decision of the Court of Appeals is of great importance in Illinois, because, purporting to follow Illinois Law, it refuses to hold the *Allin* and the *Berry* cases applicable to the facts in this case. The settled law in Illinois is thereby disturbed.

Insurance Companies in Illinois in class designation cases which, under the *Allin* and the *Berry* cases, were not required to look further than the language of the policy and the identity of the claimant, as coming within the class described in the beneficiary clause at the time the policy became payable, now will be required to inquire by other evidence whether there might not be other persons who at one time or another were within the language of the beneficiary clause, and to determine whether such class designation is not in fact a specific one. Thus, an unhappy prospect of litigation is thereby opened.

The Court of Appeals by its statement that "the problem on this appeal is one of contract: to determine the intention of the insured when he applied for the policy" stated but a portion of the problem; and, contrary to the settled law in Illinois as to the testamentary nature of insurance policies, ignored the rest of the problem, which was to ascertain that intent in the light of the conditions existing at the time of the death of the insured, no change having been made in the policy. The problem was simply to determine from the uncontradicted evidence whether the intent of the insured to provide for his widow, expressed at the time of the issuance of the policy by the designation of her as "Mrs. C. S. DeJong, wife" persisted after the divorce of Ruth and his marriage to Alberta Weber. We

submit that the persistence of such an intention was conclusively shown by the fact that he asked for no change in the policy to be made after his marriage to Alberta Weber. This should have been so found by the Court of Appeals. Such a finding would have been consonant with the law in Illinois, with the language of the policy and with common sense.

We respectfully submit that the writ of certiorari should be granted in this case, and that upon a hearing the judgment of the Court of Appeals should be reversed and the cause remanded with directions to enter a judgment in favor of the petitioner, Alberta Weber DeJong, awarding the fund to her.

Respectfully submitted,

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.

FILED
FEB 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 668

ALBERTA WEBER DEJONG,

Petitioner,

vs.

RUTH TIETSORT,

Respondent.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN J. YOWELL,
Counsel for Ruth Tietsort, Respondent.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Ruth Tietsort, respectfully submits this answer and supporting brief in opposition to petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Report of Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit which petitioner seeks to have reviewed is reported in 131 F. (2) 448.

Statement of the Matter Involved.

In the petition and supporting brief, petitioner is not always careful, in quoting the beneficiary clause in question, to give the exact and full wording thereof. For this reason, we deem it desirable to state at this point the full and exact clause involved:

> "In the event of the death of the insured, as herein provided, the amount set forth in Parts I, II, or III, for the loss of life, shall be payable to Mrs. C. S. DeJong (hereinafter called the beneficiary) relationship wife" (Tr. 6).

Petitioner's summary of the matter involved also fails to state the manner in which the case was originally brought to judgment. In the District Court, both petitioner and respondent filed motions for summary judgment based on a statement of agreed facts. Judgment was entered on the motion of respondent, Ruth Tietsort, for summary judgment. However, one of the allegations in the answer of Ruth Tietsort to the original bill of interpleader was denied by petitioner and was, therefore, not included in the statement of agreed facts on the basis of which the judgment was entered and the case argued in the Circuit Court of Appeals. This allegation was to the effect that it was respondent, Ruth Tietsort, who made the application for insurance, in which application it was she who designated Carroll S. DeJong as the insured and herself as beneficiary under the name and style of Mrs. C. S. DeJong (Tr. 2). This is pointed out here because throughout the petitioner's argument, it is assumed without foundation in fact by petitioner that the insured made the designation in question. As far as the facts before the court are concerned, the only pertinent statement is to the effect simply that when the policy was issued, Carroll S. DeJong was designated as the insured and the beneficiary was designated as appears above. However, be-

cause the law is so strong to the effect that the designation in question designated a specific beneficiary, whose identity remained at all times clear and unaltered, respondent has argued the points at issue as though it were to be taken for granted that the designation was made by the insured.

In discussing the fact findings on which the District Court (Pet. 3) and the Circuit Court of Appeals (Pet. 4) made their rulings, petitioner says that both courts found that, since the requirements of the policy for change of beneficiary were not complied with, no change was effected. This is misleading in that it fails to give proper emphasis to the fact that no effort was ever made to change the beneficiary, whether in compliance with the terms of the policy or not (Tr. 5, 23).

Questions Presented.

The facts before the Court present three questions:

(1) Whether the clause designating the beneficiary as "Mrs. C. S. DeJong (hereinafter called the beneficiary) relationship wife" designated a specific person, to wit, Ruth Tietsort, as beneficiary, or whether said clause designated the status or class of wife as beneficiary.

(2) In deciding that said beneficiary clause designated a specific person rather than a class or status, was the decision of the Circuit Court of Appeals in conflict with the applicable law of the State of Illinois?

(3) Having determined that the policy designated Ruth Tietsort as the beneficiary, did the Circuit Court of Appeals err in holding that no change or circumstance occurred to affect the vesting of Ruth Tietsort's rights under the policy upon the death of the insured?

The Circuit Court of Appeals held that the beneficiary clause in question designated a specific person, to wit,

respondent Ruth Tietsort, as the beneficiary; the court further found that no change or circumstance occurred to affect the vesting of the beneficiary's interest upon the death of the insured. In so holding, it is respectfully submitted that the court ruled in accordance with the facts in the case, the law of the State of Illinois, and the law of substantially every jurisdiction where the same or similar questions have been adjudicated.

Wherefore, respondent respectfully prays that the Court deny the petition for a writ of certiorari.

Summary of Argument.

I.

The designation "Mrs. C. S. DeJong, (hereinafter called the beneficiary), relationship wife", designated a specific person, Ruth Tietsort, as beneficiary. The addition of the word "wife" was merely *descriptio personae,* and did not limit the beneficiary to a person occupying any particular status. The fact that the words "hereinafter called the beneficiary" and the words "relationship wife" are added after the name "Mrs. C. S. DeJong" can only be construed as further marks of identification of a specific person designated as beneficiary and not as a designation of a class or status.

Continental Bank & Trust Co. v. *Sovereign Camp,* 169 La. 989, 126 So. 502, 504.

Day v. *Case,* 43 Hun (N. Y.) 179, 50 Sup. Ct. Rep. N. Y. 179, 180.

52 A. L. R. 395.

Griffiths, In re, 1 Ch. (Eng.) 739, 72 L. J. Ch. N. S. 330, 88 L. T. N. S. 547.

II.

Upon the death of the insured, Carroll S. DeJong, the rights of the beneficiary therein, Ruth Tietsort, immediately became vested and absolute, no change of beneficiary ever having been effected. Since no change of beneficiary was even attempted, the question as to the necessity for the endorsement of a change of beneficiary on the policy is irrelevant.

Freund v. *Freund,* 218 Ill. 189, 205.

III.

The divorce of Carroll S. DeJong, the insured, from Ruth Tietsort, the beneficiary, did not affect Ruth Tietsort's rights under the policy.

Begley v. *Miller,* 137 Ill. App. 278, 280-2.
Connecticut Mutual Life Insurance Co. v. *Schaefer,* 94 U. S. 457.
52 A. L. R., pp. 389, 390.

ARGUMENT.

I.

Before any approach can be made to the question of what the insured meant or intended, it is desirable that we examine carefully what the insured said. There are three parts in the beneficiary clause here in question: (a) Mrs. C. S. DeJong; (b) (hereinafter called the beneficiary); (c) relationship wife. It is respectfully submitted that in holding that this clause designated a specific person rather than a class or status, the court below not only ruled correctly but in accordance with every compulsion of grammar, common sense and the elementary principles of language. The words "(hereinafter called the beneficiary)" could only be taken as meaning the person previously designated; and further emphasis is added to the identification by describing the relationship of that person to the insured; some significance may also be attached to the fact that in the agreed statement of facts, it is clearly stated that by said designation, the defendant, Ruth Tietsort, was designated the beneficiary under said policy (Tr. 5).

Petitioner argues in her first proposition of law that "the designation by the insured, Carroll S. DeJong, of his beneficiary as 'Mrs. C. S. DeJong, relationship wife,' was a class designation of any wife of the insured" (Pet. 13).

As to the use of the word "wife" as part of the beneficiary designation, it may be well to quote the statement of the general proposition of law as stated in 52 A. L. R. at page 395, which was also aptly cited in the opinion below (Tr. 23):

> "The beneficiary being designated by name, the statement in connection therewith, that she is related to insured as 'wife', or the use of the word 'wife' as

> a further means of identification, is merely descriptive of her relationship to him, and does not in itself provide for payment to his widow only."

Petitioner has not cited a single Illinois case and there is no case either in Illinois or possibly in any other jurisdiction in which this proposition of law is questioned. The Illinois cases cited by petitioner are totally irrelevant to the issues in this case, as is more fully brought out later in this brief.

It is petitioner's main contention that in interpreting the clause in question as a specific rather than a class designation, the court was in error and held contrary to the Illinois law. However, the only case referred to in petitioner's brief which is in point is one in which the identical question was decided squarely in accord with the holding of the court below. That is the case of *Day* v. *Case,* 43 Hun (N. Y.) 179 (also cited as 50 Sup. Ct. Rep. N. Y. 179). In that case, the following facts were involved: On July 5, 1870, the Locomotive Engineers Mutual Insurance Association, a mutual benefit society, issued to H. M. Case a certificate of membership and policy of life insurance with the following clause:

> "all payments or benefits that may accrue or become due to the heirs of the person insured, by virtue of this policy, will be payable to Mrs. H. M. Case, or lawful heirs."

At the time the certificate was issued to Case, he had a wife living by the name of Amelia M. Case, and a daughter by the name of Inez H. Case. The wife, Amelia M., died September 12, 1879, and subsequently on February 3, 1882, the insured married Emma Case, the defendant. Subsequently, on May 29, 1885, the insured died leaving Emma, his widow, surviving and Inez H. his only child and heir at law. In deciding the respective rights of the daughter and the widow, the Court held, p. 180:

> "It is now contended that Mrs. H. M. Case was the

name of the defendant, his widow and that consequently, she is the beneficiary named in the certificate. That was not, however, her name at the time the certificate was issued. The name, Mrs. H. M. Case, at that time, was Amelia M. Case, and she must have been the person meant by Mr. Case in making the designation and the person named in the certificate. We can not assume that he then contemplated the death of his wife and his subsequent marriage to the defendant in this action * * *. It is urged that because the words 'Mrs. H. M. Case' were used, that it was intended that the certificate should mean one person at one time and another at another time; that it meant, Amelia M., at the time it was issued, but that it meant the defendant at the time of his death. Such, however, does not appear to us to have been the meaning of the instrument."

Petitioner quotes a criticism of this decision in 2 *Joyce on Ins.* (2nd Ed.) Sec. 830, page 1821.

As to the Joyce criticism, several considerations should be kept in mind. In the first place, Joyce makes clear that that case involved a certificate in a fraternal society and that "the object of these societies is to primarily provide for the widow of the member" (Pet. 21). In the case at bar, the policy is an ordinary policy of life or accident insurance. It may be doubted whether even Joyce would have questioned the validity of the holding had that case not involved a certificate in a fraternal society. However, even in his comment, immediately preceding the passage quoted by petitioner, Joyce states "there is certainly much to be said on both sides of this case and the reasons presented by the court are undoubtedly strong ones".

And, most significantly, when the identical question again arose before a court of last resort, years after Joyce's comment appeared in his 2nd Edition of 1917, it was again decided that the clause in question designated a specific person rather than a class or status, and this, despite the fact that a beneficial certificate was involved. That was

the case of *Continental Bank and Trust Company* v. *Sovereign Camp*, 169 La. 989, 126 So. 502. In that case, the clause in the certificate (issued by a mutual benefit society) designating the beneficiary reads as follows:

> "Three thousand dollars should his death occur after the second year of his membership, payable at his death to Mrs. E. L. Harper, Jr., bearing relation to him of wife, by the Sovereign Camp of the Woodmen of the World."

Thus the beneficiary clause under that certificate did not indicate the maiden name of the said Mrs. E. L. Harper, Jr. At the time of the said designation, the Mrs. E. L. Harper, Jr., was Mrs. Martha Ratcliff Harper. Subsequently Mrs. Martha Ratcliff Harper died and thereafter Mr. E. L. Harper, Jr., remarried. A contest ensued between the surviving widow and the children of the insured's first wife. The Court in disposing of the question of whether the beneficiary clause quoted above designated the beneficiary by class or as a specific person, makes the following significant ruling, at 126 So., p. 504:

> "It is conceded that, if the certificate had been made payable to Mrs. Martha Ratcliff Harper, Jr. who was the first wife of the insured, such a designation would have been sufficient to constitute the person named as the insured's beneficiary.
>
> "But the designation in the certificate of Mrs. E. L. Harper, Jr., as the beneficiary thereunder, was the designation of a specific person, for it can not be gainsaid that, at the time the certificate was issued, Mrs. Martha Ratcliff Harper, Jr., was the same person who was also known and designated as Mrs. E. L. Harper, Jr."

In the light of these authorities, it becomes difficult to extend any credit to petitioner's argument that the specific designations add nothing to the word "wife" (Pet. 16). On the contrary, it is the almost universal rule that the word "wife" does not affect the application of the bene-

ficiary clause where there are words of specific designation, as there are in the clause here under consideration.

As to the Illinois cases cited by petitioner, even a brief analysis demonstrates that these authorities have absolutely no relevance to the case at bar. One of the cases cited in petitioner's brief (Pet. 18) is *Modern Woodmen of America* v. *Allin,* 301 Ill. 119. As counsel for petitioner point out, that case involved a certificate in a benefit society. In that case the certificate was made payable by insured "at his death to wife and children". Perhaps the difference between this general classification of beneficiaries and the specific designation of the beneficiary in the case at bar is too clear to call for comment. And the Court in that case had before it the further fact that the beneficiary clause also designated "children" as beneficiaries, and the Court would not accept an interpretation that "children" did not include children born after the issuance of the certificate, which led to the conclusion that that was a class designation. We do not quarrel with or criticize this decision in any way except to say it has no bearing on the case at bar, where, as has been shown, the beneficiary was designated by name.

Another case cited by counsel for appellant is *Pike County Mutual Life Association* v. *Berry,* 214 Ill. App. 316 (Pet. 19). That case, like the "Modern Woodmen" case above discussed, also involved a benefit certificate which was payable to the "wife and children" of the insured. As the Court says, the "beneficiaries are not named but described". As a matter of fact when the class of beneficiaries were designated, they were not even in existence, insured having taken out the certificate before he was married! Even apart from the fact that these two cases involve certificates in mutual benefit societies, we earnestly submit that the manner in which the beneficiaries were therein designated is quite different from the designation

"Mrs. C. S. DeJong (hereinafter called the beneficiary) relationship wife".

Another case cited on the proposition in petitioner's brief (Pet. 20) is *In Re Browne's Policy*, 19 Times L. R. 99. Here again the beneficiary clause described the policy to be "for the benefit of his wife and children". It is of some importance to refer to appellant's own quotation from the language of the Court to the effect that "one is met by the presumption, which is rather of common parlance and common sense than of law, though it has been recognized by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death." In this case, too, as in *Modern Woodmen* v. *Allin*, 301 Ill. 119, and *Pike County, Etc.* v. *Berry*, 214 Ill. App. 316, the Court laid stress on the addition of the words "and children". Since the insured could not reasonably be supposed to have intended to benefit only the children living at the date of the policy, to the exclusion of afterborn children, it was reasonable to conclude there that the insured was providing for the persons occupying the status of wife and children at the time of the insured's death.

It is very interesting to observe how the Browne case just discussed was distinguished in *Re Griffiths* (1903) 1 Ch. (Eng.) 739, 72 L. J. Ch. N. S. 330, 88 L. T. N. S. 547, where a man having a wife and children effected insurance expressed to be "for the benefit of his wife, or, if she be dead, between his children in equal proportions", upon the ground that the policy in the Browne case was expressed to be for the benefit of wife "and" children, and not for the benefit of wife "or" children; and it was held that the presumption that a married man speaking of his wife intends his wife at that time was strengthened by the words "if she be dead", which seems to point to the wife who was living when the policy was effected; and consequently that a subsequent wife was not entitled to take.

Included in the statement of petitioner's first proposition of law is the assertion that in Illinois a policy of insurance is testamentary in character and speaks as of the time of the death of the insured. This point is barely mentioned in the body of the argument and does not appear again until the "Conclusion," yet it is included in the list of five questions which the petitioner conceives to have been presented to this court by the petition (Pet. 5).

Under the circumstances of the case at bar it should be adequate to answer that it is not so much a question of the time as of which the policy speaks, but of what it says. Continuing the figure of speech, under the law the policy was written to say that the woman today known as Ruth Tietsort should receive the benefits thereof upon the death of the insured. And no effort was ever made to make the policy say anything else.

However, we advert to this point principally because under petitioner's first proposition of law, petitioner cites the case of *Mutual Life Insurance Company* v. *Devine,* 180 Ill. App. 422. Here again this is the only reference to the case and there is no further mention or discussion of it in the brief or argument. In that opinion, at page 426, the Illinois court states:

> "In construing a contract the Court will, if necessary, put itself in the place of the parties and read the contract in the light of the objects they had in view and the circumstances surrounding them at the time it was made."

This is practically a universal rule and was one of the factors which led the court below to reach its conclusion that Ruth Tietsort was the beneficiary designated in the policy. It was also obviously one of the factors which led to the decision in *Day* v. *Case* and *Continental* v. *Sovereign Camp, supra.*

In the case at bar, every circumstance of the parties at the time the policy was issued and the manner in which

the designation was made leave no room for doubt that Ruth Tietsort was intended and named as the beneficiary under the policy.

II.

Petitioner's second point concerns itself with the question of whether a change of beneficiary had to be endorsed on the policy itself in order to become effective. As to the petitioner's argument that no such endorsement of change of beneficiary was necessary to make a change effective, the answer is two-fold: First, since no effort of any kind was made to change the beneficiary, it is irrelevant to discuss what circumstances might have made a change effective. Second, if the question were relevant, petitioner seeks to rely on two decisions of intermediate Appellate courts which, as the court below states, are at variance with the Illinois Supreme Court rule as announced in *Freund* v. *Freund*, 218 Ill. 189, at Page 205. The applicable legal principles are there announced as follows:

> "In the next place, although it may be true that the beneficiary has no vested right in the fund named in the policy during the life of the assured, and has no greater interest than a mere expectancy, yet, when the assured dies, the beneficiary acquires rights, which cannot be cut off except in the manner prescribed by the contract. If no other valid appointment has been made, that is to say, if no other selection of beneficiary has been made in the manner prescribed by the statute and the contract, before the assured dies, then upon his death, the beneficiary, whose selection was valid, or was in accordance with the provisions of the statute and the contract, has a vested interest in the fund."

Petitioner then seeks to fall back on the original point that no change of beneficiary was necessary because we are here dealing with a class or status designation. We

respectfully submit that this point has been adequately disposed of in the first part of our argument.

III.

The import of both the third and fourth points in petitioner's argument is that the divorce of the insured from the beneficiary took Ruth Tietsort out of the "class" to which the fund was made payable. This is clearly founded on the completely erroneous assumption that the policy as written designated a class or status as the beneficiary. Again, we submit that this question has been adequately disposed of under part one of respondent's argument.

Having properly found that Ruth Tietsort was originally specifically designated as the beneficiary, the court below then correctly went on to indicate that the divorce of the parties did not affect the rights of the beneficiary designated. As the court below states, "her rights were created by the policy of insurance; they were not created by marriage". See *Begley* v. *Miller,* 137 Ill. App. 278; *Connecticut Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S. 457; annotations in 52 A. L. R. at Pages 289-90 where practically all of the authorities throughout the country are discussed and fully support the proposition as declared by the court below.

Under petitioner's fourth proposition of law, petitioner cites the cases of *Illinois Bankers' Life* v. *Collins,* 341 Ill. 548, and *Davis* v. *Metropolitan Life,* 285 Ill. App. 398. These cases are not discussed in the brief at all. However, it may be helpful to point out that these cases merely hold that during the lifetime of the insured, where the insured has the right to change the beneficiary, the beneficiary does not have a vested interest but a mere expectancy. Here again, it should suffice merely to say that the question of the nature of the beneficiary's interest during the lifetime of the insured is entirely beside the point after the

insured has died. Upon the death of the insured, the interest of the beneficiary designated became vested beyond question. *Freund* v. *Freund*, 218 Ill. 189.

Also cited in petitioner's brief under point four is the case of *Novotny* v. *Acacia Mutual Life Insurance Company*, 287 Ill. App. 361. That case merely holds, as petitioner's brief itself brings out, that where no beneficiary is named in the policy, the fund belongs to the insured's estate. It should be enough to say that this proposition is as irrelevant as it is commendable.

Conclusion.

When the policy was issued on March 2, 1926, Claimant Ruth Tietsort was therein designated as the beneficiary, by the name and style of "Mrs. C. S. DeJong (hereinafter called the beneficiary), relationship wife." Between that date and the death of the insured on November 30, 1940, nothing occurred to affect Ruth Tietsort's interest in the policy as beneficiary. Her interest in the proceeds therefore became vested and absolute on that date. The divorce of the parties did not affect Ruth Tietsort's interest as beneficiary. The decree of the Circuit Court of Appeals for the Seventh Circuit was in accord with the law of Illinois as well as practically all jurisdictions in which the questions at issue have been adjudicated.

WHEREFORE, respondent respectfully prays that the Court deny the petition for certiorari.

Respectfully submitted,

JOHN J. YOWELL,
Counsel for Ruth Tietsort, Respondent.

Office - Supreme Court, U. S.
FILED
FEB 16 1943
CHARLES ELMORE CROPLEY

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RUTH TIETSORT,
Respondent.

Reply Brief.

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.

PRINTED BY CHICAGO LAW PRINTING CO.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Alberta Weber DeJong, respectfully submits this Reply to the Answer and Brief of Respondent.

The force of the Illinois cases of *Pike County Mutual Benefit Association* v. *Berry,* 214 Ill. App. 316, and *Modern Woodmen of America* v. *Allin,* 301 Ill. 119, cited in Petitioner's Brief, which should have controlled the decision of the Circuit Court of Appeals in this case, is not weakened by the citation of authorities in respondent's answer.

The general statement from 52 A. L. R. 395, cited on page 7 of respondent's brief, that where a beneficiary is *designated by name,* words of relationship are descriptive

only, does not apply to the case at bar, for the reason that in the policy in question the beneficiary was not designated by name. Had the policy read "Ruth De Jong," a specific person, instead of "Mrs. C. S. DeJong," which designated any wife of the insured, a different question would be presented.

In *Day* v. *Case*, cited on page 8, the beneficiary was "Mrs. H. M. Case *or lawful heirs*"; and in *Griffiths* case, cited on page 12, the proceeds were payable to the "wife, *or if she be dead*" to the children, so that in each case there was a definite pointing out of the first wife as the person intended. No such indication is present in the policy in question, which is payable to "Mrs. C. S. DeJong, relationship wife" of the insured.

In *Continental Bank and Trust Company* v. *Sovereign Camp*, cited on page 10, the question was whether the second wife should take the entire fund or whether she should share with the children of the first marriage. The court, in ascertaining the intent of the insured, found that the insured clearly had in mind the person who was his wife at the time of the issuance of the certificate; and go on to say:

> "This view of the insured's state of mind when the certificate was issued is strengthened by the reflection that he could reasonably be supposed to have in contemplation the birth of children as the result of his marriage. In that case, and in the event the mother of the children survived him, it was wholly reasonable for the insured to conclude, as undoubtedly he did conclude, that the children would benefit under the policy as well as their mother. On the other hand, it is utterly unreasonable to suppose that the insured had in mind at the time a possible second marriage, as the result of which he would be survived by a second wife who would take under the certificate, *to the exclusion of his children by his first marirage.*

If it be said that the insured may have considered the contingency of a second marriage, then it may also be said, with equal reason, that he also considered that, under the by-laws of the insurer, the needs of his second wife as well as the needs of his children by his first wife would be provided for." (Italics ours.)

(The by-laws provided that where the designated beneficiary died, the benefit should be paid to the surviving widow and surviving children of the member, share and share alike.)

The answer of respondent is based upon the contention that Ruth Tietsort, then Ruth DeJong, was *named* in the policy as beneficiary. This is not so. The designation of the beneficiary as the wife of the insured by the description of "Mrs. C. S. DeJong" is not the naming of the particular person, Ruth, who was then the wife of the insured, but is the designation of any wife of the insured (all of whom would be "Mrs. C. S. DeJong") who should be his wife at the time of his death, when the fund became payable. The intent that the widow of the insured should benefit was present at the time the policy was applied for and issued: who the widow might be, was to be ascertained at the time of his death.

In *Mutual Life Insurance Co.* v. *Devine,* 180 Ill. App. 422, cited and quoted from by respondent as one of petitioner's cases, on page 13 of respondent's brief, the Court, on page 426, say:

"At common law, a contract must be so construed as to carry into effect the real intent and understanding of the parties * * *

In construing a contract the court will, if necessary, put itself in the place of the parties and read the contract in the light of the objects they had in view and the circumstances surrounding them at the time it

was made, so as to be able to understand the language employed in the sense intended by them * * *

In contracts of life insurance proper, * * * the intent of the insured as to who the beneficiary shall be is the intent of all concerned * * * beneficiaries are often not yet *in esse*. * * * It is a matter of common knowledge that in a very great majority of cases, life insurance is purchased by the insured, because of his laudable desire to leave, when he dies, to those persons who are the natural objects of his love, care and bounty an amount of money larger than he could otherwise do, and to thereby decrease to that extent the chance of his dependent wife, * * * becoming a public charge or in want of the necessities of life.

When by the terms of a Will, a fund is given to a class of persons, it is held by what we understand to be an unbroken line of authorities that the determination of who belong to the class and who consequently are entitled to participate in the distribution of the fund is postponed until the death of the testator, and the fund goes to the survivor or survivors of the designated class. We are aware that there is a line of authorities holding that contracts of insurance are not to be construed by the same rules applicable to the construction of wills. There are also a number of cases in various jurisdictions in the United States holding exactly the contrary, as to the parts of life insurance contracts relating to the distribution of the fund. These last mentioned cases are, in our opinion, the best reasoned, and where followed, tend in many cases to prevent a distortion of the real purpose of life insurance contracts.

It cannot be denied that the disposition of life insurance funds arising from a straight life insurance policy is in many respects strikingly akin to a testa-

mentary disposition of property. The will of the insured, like the will of the testator, when ascertainable and not in conflict with positive law, usually governs. The distribution does not take place until the death of the insured in the one case, and the death of the testator in the other. The fund usually goes to persons bound to the insured in the one case and the testator in the other by ties of consanguinity or affinity. The disposition of the fund is governed by the arbitrary wish of the party directing it.

No sufficient reason can be urged, it seems to us, why the real intention of the insured, the real thing on which his mind was centered when he made his insurance contract, should not be ascertained by the same rules by which the real intention of a testator, the real thing on which his mind was centered when he made his will, is determined."

The real thing on which the mind of the insured was centered when he obtained the insurance policy in question was the benefit to his widow in case of his accidental death. This remained his intent after his divorce from his then wife Ruth, and his marriage to petitioner. Under the settled law in Illinois, the fund in question is payable to the widow of the insured, who is the petitioner in this case.

We respectfully submit that the Writ of Certiorari should issue as prayed.

Respectfully submitted,

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.